Supreme Court, U.S.
FILED
FEB 24 2010
OFFICE OF THE CLERK

No. 09-513

In The
Supreme Court of the United States

JIM HENRY PERKINS AND JESSIE FRANK QUALLS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF VETERANS AFFAIRS, AND ROBERT T. HOWARD, IN HIS OFFICIAL CAPACITIES AS ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

CAROLINE SMITH GIDIERE
ANDREW P. CAMPBELL
LEITMAN, SIEGAL, PAYNE & CAMPBELL
2100-A SOUTHBRIDGE PARKWAY
SUITE 450
BIRMINGHAM, ALABAMA 35209
205-803-0051

Attorneys for Petitioners

P. STEPHEN GIDIERE III
Counsel of Record
MICHAEL D. FREEMAN
GREGORY C. COOK
ALEXIA BOWERS BORDEN
BALCH & BINGHAM LLP
1901 SIXTH AVENUE N.
SUITE 1500
BIRMINGHAM, ALABAMA 35203
205-251-8100
sgidiere@balch.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Table of Contents

Table of Cited Authorities ii

Argument 1

Conclusion 3

Table of Cited Authorities

Cases

Cooper v. Fed. Aviation Admin.,
No. 08-17074, slip op. 2815 (9th Cir. Feb. 22, 2010) 1, 2, 3

Argument

The established split in the circuits on the question presented here has now expanded to include the Ninth Circuit. On February 22, 2010, the Ninth Circuit decided the issue of whether "actual damages" under the Privacy Act encompasses both pecuniary and non-pecuniary damages. *Cooper v. Fed. Aviation Admin.*, No. 08-17074, slip op. 2815 (9th Cir. Feb. 22, 2010). The Ninth Circuit held that it does:

> Having reviewed the text, purpose, and structure of the Act, as well as how actual damages has been construed in other closely analogous statutes, we hold that Congress intended the term actual damages in the Act to encompass both pecuniary *and* nonpecuniary injuries.

Cooper, slip op. at 2835 (emphasis in original).

The Ninth Circuit's decision puts the Eleventh Circuit squarely on the minority side of the circuit split. Pet. 11-14. And it further negates Respondents' already spurious argument that the circuit split is a "narrow" one. Br. in Opp. 14. Even by Respondents' count, there are now four circuits that have weighed in on the issue presented. Br. in Opp. 12 (conceding split among Eleventh, Fifth, and Sixth Circuits).[1] There are

---

[1] It is also worth noting that the Ninth Circuit rejected the sovereign immunity argument that Respondents argue would validate the Eleventh Circuit's minority position. *Cooper*, slip op. at 2835-2838.

now six circuits by Petitioners' count. Pet. 12 (explaining Fourth and Tenth Circuit precedent).

The fact that the United States may at some point seek certiorari in *Cooper* is no reason to deny review here. As the United States noted in its letter to the Clerk of February 23, 2010, the United States has not even "determined whether it will seek rehearing en banc in [*Cooper*]." Thus, it is entirely speculative as to whether *Cooper* will ever be presented to this Court for review.

In any case, the present case would constitute a superior vehicle for this Court's review. In its decision, the Ninth Circuit noted that the government disputed the "evidence regarding [Cooper's] nonpecuniary injuries" and held that, "on remand, the district court has discretion to entertain motions from the parties regarding whether Cooper has proffered sufficient evidence of his nonpecuniary injuries to prove actual damages under the Act." *Cooper*, slip op. at 2838 n.4. Thus, *Cooper* arises in a genuinely interlocutory posture, because there are unresolved factual issues that may bear on the availability of damages for nonpecuniary injuries. In this case, by contrast, the Veterans' nonpecuniary injuries are undisputed. Pet. 13-14; Br. in Reply 1 n.2.

Conclusion

For the foregoing reasons, and those stated in the Veterans' petition for writ of certiorari and reply brief, the petition for a writ of certiorari should be granted.[2]

Respectfully submitted,

P. Stephen Gidiere III
Counsel of Record
Michael D. Freeman
Gregory C. Cook
Alexia Bowers Borden
BALCH & BINGHAM LLP
1901 Sixth Avenue N., Suite 1500
Birmingham, Alabama 35203
205-251-8100
sgidiere@balch.com

Caroline Smith Gidiere
Andrew P. Campbell
LEITMAN, SIEGAL, PAYNE & CAMPBELL
2100-A SouthBridge Parkway, Suite 450
Birmingham, Alabama 35209
205-803-0051

Attorneys for Petitioners

---

[2] If the Court has some question as to whether this case or *Cooper* is a more appropriate vehicle for review, the Veterans respectfully suggest that one alternative is for the Court to hold their petition for writ of certiorari in abeyance, pending the United States' decision to seek certiorari in *Cooper* or not.